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IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

vs.

THE STATE OF NEW YORK,

Appellee.

On Appeal from the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

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This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. ("CPDA"), with the consent of all parties to the action, in support of appellant.

Interest of the *Amicus Curiae*

CPDA is a national trade association of more than 700 independent wholesalers of magazines and paperback books. The majority of magazines and paperback books sold in retail outlets throughout the nation are distributed by CPDA members. These include all of the well known names in periodical literature, such as *Time, Life, Look, TV Guide,* etc., and all of the leading lines of paperback books, such as Bantam, Pocket Books, Dell and Signet.

The members of CPDA are vitally interested in the outcome of this appeal because §484-h of the New York Penal Law, and comparable statutes in other states, which make it a crime to distribute to minors certain vaguely defined classes of non-obscene literature, will (a) deter the sale of constitutionally protected literature to adults, and (b) make it extremely difficult (and in some cases virtually impossible) for minors to purchase any work which refers to sex. This will obviously hurt the businesses of responsible wholesalers and retailers of publications. More important, it will erode First Amendment freedoms.

The Purpose of This Brief

It is our position that the First and Fourteenth Amendments prohibit *any* state interference with the distribution of non-obscene literature. If literature is not obscene, it is constitutionally protected, and if it is constitutionally protected, the proscriptions of the First and Fourteenth Amendments bar any state interference with its free dis-

semination. See *Paramount Film Distributing Corp.* v. *City of Chicago,* 172 F. Supp. 69 (N.D. Ill. 1959), where the Court discussed the constitutional and logical problems which arise whenever the legality of speech is made dependent upon the age of the audience.

Moreover, any statute which permits sales of particular books to a 17-year old, but prohibits sales of those same books to a 16-year old, is bound to be arbitrary and vague to the point of incomprehension. Given the differences which exist among minors and the necessary ambiguities in any rule which proscribes the distribution of certain literature, no rational and constitutional standard can be devised for defining the non-obscene literature which minors may not read.

However, we will not in this brief consider the question of whether it is constitutionally permissible to restrict the sale of non-obscene literature to minors. We are confident that this question will be adequately dealt with in appellant's brief. Instead, we shall demonstrate in this brief that even if some state regulation of the distribution of non-obscene literature to minors is constitutionally permissible, §484-h is, nevertheless, constitutionally defective (a) because it is simply incomprehensible, (b) because it makes the legality of a sale dependent, in part, upon a publication's so-called "suitability" for minors, (c) because it deals with the problem of minors' morals in the manner most likely to impede the constitutional rights of both adults and minors, and (d) because it would make meaningless the scienter requirements of *Smith* v. *California,* 361 U. S. 147 (1959).

POINT I

Section 484-h is unconstitutionally vague.

Section 484-h does not attempt to regulate obscenity. Neither the word "obscenity" nor the word "obscene" appears at any point in the statute. Instead, the statute makes it a crime to sell to minors (defined as persons under 17 years of age) any publication which is "harmful to minors." "Harmful to minors" is defined as

> "any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
>
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors."

This definition makes applicable to minors concepts which are derived, in large part, from opinions of this Court dealing with obscenity. *E.g., Roth* v. *United States,* 354 U. S. 476, 489 (1957); *Memoirs* v. *Massachusetts,* 383 U. S. 413, 418 (1966). It is an attempt to strip language from context in order to protect a criminal statute from constitutional attack. However, the attempt fails. The obscenity concepts which originated in *Roth* are designed for adults and obscene publications only. Stripped from the context for which they were designed, and applied to minors and "harmful" publications, the unavoidable vagueness of these

obscenity concepts is magnified to the point of incomprehension.

A brief consideration of the problems which a bookseller will face under §484-h illustrates the hopeless ambiguity.

Suppose, for example, that a wholesaler offers a retailer a non-obscene book on Greek mythology which contains photographs of classical statues, and relates some of the classical legends, without omitting the references to sexual behavior. Even if this bookseller had nothing else to do with his time, and even if he had the assistance of the most learned members of the bar, he could not possibly determine whether such a work appeals to the prurient, shameful or morbid interest of minors. How could he determine what interests of minors are appealed to by the Oedipus legend? His approach cannot be introspective because he is not a minor. Should he consider the interests of a mature 16-year old, an immature 15-year old, or a precocious 14-year old? Should he consider the interests of a minor in his town, in his county, in his state, or in the country as a whole? If he confers with psychologists and educators, he will come up with conflicting answers. The problems are insurmountable.

Similarly, the bookseller could not possibly determine whether the book is patently offensive to prevailing standards in the adult community as a whole with respect to what is "suitable" for minors. The opinions of this Court could be of no help because a new factor, "suitability," has been added to the judicial definition of obscenity.

Nothing less than a team of sociologists and psychologists could say what the "prevailing standards in the adult community" are concerning "suitable material for minors." Moreover, it is quite likely that such a team would conclude that "in the adult community as a whole" (whatever that may be), there simply are no "prevailing standards" on this question.

The bookseller would have comparable problems if he attempted to determine whether the mythology work had "redeeming social importance for minors." Is it socially important for the average 14-year old to be versed in Greek mythology? What about the exceptional 14-year old?

The inescapable conclusion is that no rational statutory definition can be formulated in terms of the interests of minors, "suitability" for minors, or social importance for minors. An adult bookseller could, perhaps, make sense out of comparable obscenity statutes which focus on adults, since he is bound to have greater knowledge of the adult mind, and since the definition of obscenity, as limited by decisions of this Court, applies only to a relatively small and fairly obvious class of materials. When, however, the necessarily vague obscenity concepts are employed in a "harmful to minors" statute, the bookseller can only throw up his hands. See *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 504-05 (1952).

POINT II

Section 484-h is unconstitutional because it defines "harmful to minors" in terms of adult conceptions of "suitability."

Subsection (f)(ii) of §484-h defines "harmful to minors" in terms of patent offensiveness "to prevailing standards in the adult community as a whole with respect to what is *suitable* material for minors" (emphasis added). In addition to being unconstitutionally vague, this aspect of the definition seeks to make First Amendment rights dependent upon community consensus. Instead of the Constitution acting as a check upon the powers and prejudices of the majority, constitutional rights are to be limited by the opinions of the majority. This, we respectfully submit, is an attempt to nullify, by statute and public opinion, the restrictions which the Constitution imposes.

The First and Fourteenth Amendments apply to minors as well as to adults. See *Matter of Gault*, 387 U. S. 1 (1967). These amendments do not guarantee that all literature will be enlightening and edifying to minors; they say nothing about "suitability." Rather, these amendments guarantee freedom of speech. If they permit any restrictions on the dissemination of non-obscene literature (and we contend that they do not), they require, at a minimum, that the restrictions not be defined in terms of the opinions of some amorphous group concerning the "suitability" of the literature.

A parent can restrict what his child reads. However, if constitutional rights are to be independent of public

opinion, a minor's right to read may not be subordinated to unascertainable (and probably imaginary) prevailing adult standards concerning "suitability." The "suitability" standard can only serve to squelch free inquiry by the young and to entrench the opinions and prejudices of "the adult community as a whole." A recent comment in the Columbia Law Review points up the incompatibility between democracy and a "suitability" standard:

> "[T]oday's children are tomorrow's adults. Because a child will accept uncritically what he hears, he is to hear nothing but what the majority wants him to hear. Having heard, and by hypothesis accepted, nothing but orthodoxy all his life, he is to be suddenly transformed into a rational adult who will choose impartially in the marketplace of ideas. Surely this is too much to expect. Surely if we let any orthodoxy monopolize the minds of our children, we risk letting it control the future of our society. The first amendment, then, if its purpose is to preserve an authentic competition among opinions, must protect expression to children as well as to adults. It may be that children are so immature and unsophisticated that they can easily be led into confusion and error. But some risk of confusion and error is preferable to the risk of a deadening conformity of thought." (*Exclusion of Children from Violent Movies,* 67 Col. L. Rev. 1149, 1158 (1967) (footnote omitted).)

We recognize, of course, that certain members of this Court have subscribed to a definition of obscenity which requires, to some degree, a consideration of community standards concerning patent offensiveness. *Memoirs* v. *Massachusetts,* 383 U. S. 413, 418 (1966). However, there is a critical difference between (a) allowing the opinions of the adult community to determine, in part, what literature is forbid-

den to the entire community because it is patently offensive, and (b) allowing the opinions of the adult community to deny, to minors alone, access to certain literature which some adults find "unsuitable." When, in obscenity cases, the standards of the adult community are assessed in order to determine what is patently offensive to adults, the views of the most puritanical will be counterbalanced by the views of those who are more open-minded; this will prevent the extremist advocates of censorship from determining what literature must be unavailable to all. But, under §484-h, neither tolerant adults nor minors will act as an adequate check upon the prejudices of the most narrow-minded. The minors whose constitutional rights are to be defined have no voice in determining what is "suitable." The tolerant adults, on the other hand, are hardly likely to oppose restrictions on the rights of minors with the same vigor they would bring to bear in protecting their own constitutional freedoms.

Moreover, by concerning itself with "suitability," §484-h goes far beyond any definitions which have been formulated by this Court. The concept of "patent offensiveness," as previously employed by this Court, can be meaningfully applied in particular cases. The concept of "suitability," however, cannot; it is entirely unworkable, and is bound to impede freedom of speech and to foster conformity.

POINT III

Section 484-h is unconstitutional because it makes it a crime to sell non-obscene literature.

Any restriction upon the distribution of non-obscene literature which is "harmful to minors" is bound to make it more difficult for adults to obtain non-obscene literature and for children to obtain "harmless" literature. However, if this Court should decide that a state's interest in protecting minors from certain non-obscene literature justifies legislation, we respectfully submit that such legislation must be designed so as to afford this protection in a manner which will not needlessly impede the distribution of non-obscene literature to adults or of "harmless" literature to minors. (For the purposes of argument, we will make the unrealistic assumption that the term "harmful to minors" is not incomprehensibly vague.) As First Amendment freedoms are necessarily involved, any type of state legislation cannot do.

Criminal legislation, such as §484-h, will have the most inhibiting impact upon the distribution of non-obscene literature to adults and "harmless" literature to minors. If a busy luncheonette owner, such as appellant Ginsberg, can go to jail for selling a "harmful" book to a minor, the luncheonette owner may very well decide to sell no literature to minors or to refuse to sell anything which might possibly be found "harmful."

Under §484-h, only two types of booksellers will be willing to handle potentially "harmful" literature and to sell books to minors:

(a) those who are willing to run the risk of being prosecuted and condemned as criminals; or

(b) those who are willing to assume the burden of deciding whether particular publications may be "harmful to minors," and who are also willing to inquire into the ages of all young customers.

Given the realities of retailing, few, if any, booksellers will meet these criteria. Appellant Ginsberg, for example, does not appear to be the type of man who wishes to run the risk of criminal conviction and jail. Moreover, as the hard-working owner of a busy luncheonette, he has no time to decide whether a work on Greek mythology or *Playboy* (or anything else) may be "harmful to minors." Furthermore, as a businessman, he will not wish to offend his youthful customers by making them prove their ages, or by debating with them whether a particular publication is "harmful."

In all probability, if his conviction is upheld, appellant Ginsberg (and countless other booksellers) will have no choice except to refuse to sell books to minors or to refuse to handle any material which may be "harmful." Should this Court affirm, then, as a matter of reality, the category of possibly "harmful" literature will quickly encompass all pictures of nudes, anything which deals with sex, and anything deemed objectionable by any group of public or private censors.

It is certain, therefore, that if §484-h is held constitutional, there will be a serious interference with the constitutional rights of both adults and minors to read.

Non-criminal regulation of "harmful" literature can equally promote any legitimate state interest in protecting minors, and can do so without impeding First Amendment freedoms to the degree that criminal legislation will. For example, if a bookseller knows that he does not run the risk of jail unless the sale of a book to a minor has been enjoined or unless a court or an administrative body has, in a constitutional manner, declared the book "harmful," he will be less inclined to turn away minors or refuse to sell publications which might be "harmful." See *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957); *Freedman* v. *Maryland,* 380 U. S. 51 (1965). At the same time, well-drawn injunctive or administrative legislation could sufficiently restrain that same bookseller from selling "harmful" literature to minors.

In short, if civil, rather than criminal, legislation is utilized by the state, there will be a less serious interference with free speech, and minors will be equally protected.

This is not to suggest that this Court must tell a state legislature the means to use in carrying out its duties. However, when First Amendment freedoms are involved, this Court must insure that state legislation is "reasonably restricted to the evil with which it is said to deal"; it must insure that not even a part of the house is needlessly burned down in order to "roast the pig." *Butler* v. *Michigan,* 352 U.S. 380, 383 (1957). Since criminal legislation needlessly interferes with the distribution of non-obscene literature to minors, and since any legitimate state interest can be fully protected by non-criminal legislation, §484-h should be held incompatible with the First Amendment.

POINT IV

Section 484-h is unconstitutional because it does not require scienter.

Subsection (g) of §484-h imputes "knowledge" of "harmful" contents to any seller of a "harmful" publication who has

> "general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:
>
> "(i) the character and content of any material . . . which is reasonably susceptible of examination by the defendant, and
>
> "(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

Because of its breadth and vagueness, this "knowledge" provision would permit the conviction of a bookseller who actually had no knowledge of a book's contents or of the "harmful" nature of those contents. This provision—and, in particular, the phrase "or a belief or ground for belief which warrants further inspection or inquiry"—would require a bookseller to either:

(a) run the risk of jail;

(b) refuse to sell publications to minors;

(c) refuse to handle publications which might have pictures of nudes or which might refer to sex; or

(d) familiarize himself with every publication he sells (i) which might have pictures of nudes, (ii) which might refer to sex, or (iii) which is claimed to be "harmful" by any public or private censor, and, in addition, require all youthful-looking customers to prove their ages.

Here, also, many (almost certainly, most) booksellers will choose one of the safe and economically realistic alternatives, and the First Amendment rights of both adults and minors will be significantly infringed.

Commentators have pointed up the constitutional infirmities of any statute which liberally imputes knowledge of obscene or "harmful" contents to a wholesaler or retailer of publications:

> "To insist that dealers in books and magazines determine at their peril which ones must not be sold to adolescents would be asking the impossible of them and therefore would probably violate the constitutional requirement of scienter."
>
> (Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 86 (1960) (footnote omitted).)

> "[S]uch people [wholesale distributors and booksellers] cannot be expected to scrutinize the contents of everything they sell to determine its 'prurient appeal' or its 'patent offensiveness,' let alone its 'redeeming social importance.' "
>
> (Note, *More Ado About Dirty Books,* 75 Yale L.J. 1364, 1401 (1966).)

A statute which imputes knowledge of "harmful" contents whenever there is "ground for belief which warrants

further inspection" does not, in reality, require scienter at all. Instead, it compels economically unfeasible inspections, and creates an unrealistic fiction which subverts First Amendment freedoms. A bookseller prosecuted under §484-h faces the same dilemma which the bookseller defendant faced in *Smith* v. *California,* 361 U. S. 147 (1959); like the bookseller in *Smith,* appellant Ginsberg is being put under extreme pressure by the state to engage in rigorous self-censorship.

In *Mishkin* v. *New York,* 383 U. S. 502 (1966), this Court said (at 511):

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

Section 484-h is unconstitutional because its "knowledge" provisions require self-censorship, and do not, in the slightest, "compensate for the ambiguities inherent in the definition" of "harmful to minors."

POINT V

Even if all arguments made on appellant's behalf are rejected, the judgment cannot be affirmed unless this Court considers the contents of the publications sold.

We respectfully submit that, under all the circumstances, this Court should hold §484-h unconstitutional. We note, however, that even if it may be a crime to sell certain non-obscene literature to minors, and even if §484-h is constitutional, the conviction cannot be affirmed unless this Court further finds that the Constitution permits the states to restrict the sale to 16-year old males of the particular

publications sold by appellant. For, unless the First Amendment is inapplicable to minors, no conviction under §484-h can stand unless the publication and sale in question fall within the area of permissible state regulation. See *Matter of Gault*, 387 U. S. 1 (1967).

Accordingly, if this Court should reject the various arguments raised in support of appellant, we would ask it to determine, independently, whether, under any standard which might be deemed applicable, a bookseller has a constitutional right to sell the particular publications here involved to a 16-year old male. Ample precedents exist for such independent review of state court findings involving speech. *Redrup* v. *New York, Austin* v. *Kentucky* and *Gent* v. *Arkansas*, 386 U. S. 767 (1967); *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964).

Conclusion

New York Penal Law §484-h should be held unconstitutional, and the judgment should be reversed.

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Respectfully submitted,

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